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Guardians of the Environment

Indigeneity and Ecology in New Zealand in Light of the WAI 262 Claim

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Introduction

In the long struggle for survival that followed colonization, the full and proper enforcement of the Treaty of Waitangi, signed in 1840 between Maori and the British Crown has been a beacon for Maori activism. While the Treaty organized a transfer of sovereignty to the British Crown and marked the official annexation of New Zealand by Britain, it also guaranteed Maori rights, protected Maori property and granted Maori the status of British subjects. The fundamental ambiguities lingering over the interpretation of the Treaty – namely the actual nature of the transfer of sovereignty and the persistence of Maori authority over the land – did not prevent it from being considered by both sides as the founding document of the nation. The Treaty remained a central reference in New Zealand politics even though the first conflicts over its enforcement erupted soon after its signature. In spite of a number of subsequent legal defeats before New Zealand and British Courts to have the Treaty recognized as having legal force[1], Maori remained intent on having the terms of the Treaty upheld.

In the context of reconciliation politics initiated in the late 1970s by the New Zealand government and given full force from 1985 onwards[2], a legal framework was set up to deal with Maori claims relating to alleged violations of the terms of the Treaty, which was given new prominence in national politics. The new Waitangi Tribunal was thus given authority to review both contemporary and historical grievances brought forward by Maori tribes or individuals and to advise the government on remedies or compensation. While the decisions of the Tribunal did not have binding force, they soon acquired

1. "*It is well settled that any rights purported to be conferred by such a Treaty of cession cannot be enforced by the courts, except in so far as they have been incorporated in municipal law.*" : *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590), Privy Council.

2. Treaty of Waitangi Act 1975; Treaty of Waitangi Amendment Act 1985.

moral force in a political and legal environment more sympathetic at last to the plight of the indigenous minority, left almost landless by the end of the 20th century. The Tribunal quickly became a public forum for Maori to express their views on the New Zealand government's policies towards them, as well as one of the prime vectors for indigenous political action. Meanwhile, the first Maori victories before traditional legal bodies such as the New Zealand Court of Appeal marked the beginning of the recognition of the Treaty of Waitangi as a document endowed with a measure of legal or even constitutional force[3]. The process known as "the process of Waitangi" had been set into motion: it was to keep Maori concerns at the forefront of New Zealand politics. A whole range of Maori claims would be addressed, not only over customary land but also over a number of natural elements.

This communication deals with the Fauna and Flora WAI 262 claim, arguably one of the most important claims ever submitted to the Waitangi Tribunal. The claim process has recently come to a close with a final report issued in July 2011, following twenty years of investigations. The claim, focusing on indigenous biodiversity as a whole and on the indigenous system of knowledge relying on this biodiversity, brings together fundamental issues relating both to indigenous rights and to political ecology. To understand its scope and significance, it will first be necessary to present the Maori concept of "guardian of the environment" which stems from the indigenous identity itself, and to review the political use of that concept both on the part of Maori and on the part of the Crown. Then, we will look at the claim itself and at the various challenges it encompasses, notably the contradictions between the western concepts of intellectual property versus an indigenous holistic worldview.

Indigeneity and ecology

The concept of indigeneity surfaced as a means to legitimize Maori demands in the context of reconciliation politics. This concept made it possible to present the indigenous worldview as a valuable alternative deserving official recognition, particularly in a post-colonial society willing at the time to become truly bicultural[4]. We'll refer to the definition of indigeneity elaborated by Maori sociologist and academic Mason Durie:

3. See: New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, 663.

4. Biculturalism became an official policy under David Lange's Labour government in the mid 1980s. By the late 1900s –early 2000s, the term started to be phased out, as new immigration policies had changed the traditional pakeha/ Maori make-up of the New Zealand population. Today, New Zealand presents itself as a multicultural rather than bicultural nation.

> *A long-standing bond with the land and the natural environment is the fundamental feature of indigeneity, and arising from that relationship it is possible to identify five secondary characteristics of indigeneity: time, culture, an indigenous system of knowledge, environmental sustainability, and a native language.* (Durie 2005: 2)

For Mason Durie, indigeneity is therefore a variation of ethnicity which makes it possible to move beyond dubious connotations of race. Instead, it lays stress on social and cultural interactions. Indigeneity is a concept referring to a global worldview. It conveys a relationship to the land which is of a spiritual nature; it enables the individual to be truly grounded in a place together with the community he is part of – a notion expressed in Maori by *turangawaewae*, literally a place to stand. An individual has no intrinsic significance outside of a set of interdependent relationships all going back to the land. The notion is essential because it confers meaning and connects past, present and future through a line of ancestors all linked to the land, a key notion expressed in turn by *whakapapa* or genealogy. In his definition, Mason Durie establishes a correlation with the contemporary discourse of political ecology: the "special bond" to the earth induces respect, which in turn opens on to a genuine concern for the preservation of the natural world, translated here into "environmental sustainability." The "indigenous system of knowledge" stems from this special relationship. It is implicitly distinguished from western approaches based first on exploitation and profit. "Time" and "culture" refer to the occupation of the land by the indigenous people, either from time immemorial or in any case as first occupants. This confers legitimacy to their claim over the land or the natural elements associated to it. A unique "native language" (and culture) is yet another distinctive marker associated today with world heritage. This conceptual grid is an efficient tool for delegitimizing any form of displacement of indigenous peoples.

In the New Zealand context, the notion of indigeneity is almost always referred to through the Maori phrase *tangata whenua*, literally the people of the land, which is used officially and routinely today at government level with regard to Maori. This concession to bicultural politics also works as a constant reminder that most customary land in New Zealand was alienated by the colonization process.

The holistic framework within which indigenous cultures and worldviews have traditionally developed is opposed to western worldviews centered on individuals rather than groups (Dumont: 12-23). This fundamental difference is used again as a political weapon to assert the worth of indigenous cultures, in particular in relation to the preservation of the environment, a modern concern that has gained prominence and has been voiced more and more forcefully on

the political scenes around the world in the last thirty years. Mason Durie thus also affirms:

> *But despite socio-economic similarities and comparable experiences with colonisation and postcolonial development, the unifying feature of indigenous peoples has a more fundamental quality that depends on a sense of unity with the environment. The individual is a part of all creation and the idea that the world or creation exists for the purpose of human domination and exploitation is absent from indigenous world-views. (Durie 2008: 3 emphasis mine)*

Today, this appears as a voice of wisdom very much in tune with contemporary concerns about the commodification of the environment at large. It also permits the introduction of a notion of responsibility: "Territory confers authority and obligation" (Durie 2008: 5), a notion which in turn is completely in tune with the Maori concept of guardianship, *kaitiakitanga*. This concept has been used since the early 1980s to substantiate claims put to the Waitangi Tribunal over customary land or natural elements such as rivers or mountains (Waitangi Tribunal 1983). *Kaitiakitanga* explicitly places Maori in a holistic relationship to the environment, as part of a totality rather than divorced from it, and it also induces duties. In this sense, it can be paralleled with recent approaches in political ecology which have adopted a systemic view of environmental problems. This systemic view was voiced in New Zealand as early as the 1970s by the Values Party, today the New Zealand Green Party.

However, the difference here is that guardianship is intimately connected to Maori identity and is not simply a reasoned political choice. The indigenous voice adds a spiritual dimension which is absent from mainstream political ecology. For Maori, environmental damage is equated with spiritual loss. That spiritual loss in turn affects indigenous wellbeing in a way which is specific and different from the emotional impact and the impact on health that such damage may have on non-indigenous people. This is the hallmark of the indigenous discourse centered on the notion of guardianship. If "all New Zealanders" are frequently included in the fight for the defence of the environment [Sharples 2010: 3], the role of *kaitiaki* falls only on indigenous people. It is construed as a matter of survival for indigenous people, both for their physical and spiritual integrity, because of their special connection to the land. Margaret Mutu for instance, an academic and Maori leader, states that: "Only mana whenua – that is, those who belong to the land - can be kaitiaki and hence exercise kaitiakitanga." (Mutu: 16)

For Maori, guardianship has clearly been used as a means of empowerment particularly in relation to government agencies and ministries. From a timid recognition starting in the 1980s thanks in particular to the work of the

Waitangi Tribunal, it has been embedded into New Zealand legislation and has become a household phrase.[5] But what has the Crown really conceded to Maori on that front?

The first official recognition by the Crown of the role of Maori as "guardians" of the environment came in 1991 in the Resource Management Act (RMA) which states that:

> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*
> *(a) kaitiakitanga* (RMA 1991section 7 (a))

The act was the brainchild of the Ministry of Environment and also the prelude to a series of official policy statements, issued in response to the setting up of new international environmental frameworks, in particular Agenda 21.[6] The idea was to apply the concept of sustainability to New Zealand. All of those policy statements and their subsequent enforcement were reviewed by the Waitangi Tribunal as back up evidence in the WAI 262 claim (McClean and Smith 2001). The claim had been brought forward by a group of Maori claimants in 1991 on the specific issue of the management of the native New Zealand environment by the government.

Looking at the *Draft Strategy 2000* which was officially adopted in 1995 as *Environment 2010 Strategy* (Ministry for the Environment 1995), the experts commissioned by the Tribunal noted the requirement that "[...] the natural treasures and *taonga* of Maori are protected, and the cultural practices of Maori associated with the environment are provided for."(McClean and Smith 2001: 664).

This was an indirect reference to the provisions of the Treaty of Waitangi, article Two, in particular the term *taonga* used in the Maori version of the Treaty and which can be translated in English by "their most prized possessions or treasures". Here the Crown appeared to admit that it was bound under the Treaty of Waitangi to recognize and foster the special relationship between the indigenous people and the environment as well as the associated notion of *kaitiakitanga* – guardianship. However, throughout the 1990s, as pointed out by

5. Under the heading "Maori culture", the official New Zealand Tourism Board website *100% Pure New Zealand* includes a popularized version of the *kaitiakitanga* concept destined to potential tourists planning a trip to New Zealand (New Zealand Tourism Board 1999-2011).

6. Agenda 21 was issued following the Earth summit in Kyoto in 1992.

the Tribunal, the New Zealand government continued to advocate the primacy of the market and to apply deregulation to vast sectors previously controlled by public bodies. This was bound to clash with environmental concerns involving Crown land and with Maori tribes asking for consultation processes. The lack of proper consultation was pointed out notably through Maori submissions to the Waitangi Tribunal. Similarly, the will of the government to move from the administration of common resources to a property rights regime applying to natural resources (water, etc.), in contradiction with customary rights, raised concern.

The final *New Zealand Biodiversity Strategy* released by the newly elected Labour government in 2000 appeared to give more emphasis to Maori demands and notably stated that "*Iwi* and *hapu* [tribes and sub-tribes] as *kaitiaki* are active partners in managing biodiversity." (McClean and Smith 2001: 668). One of its governing principles referred specifically to the Treaty of Waitangi:

> *The special relationship between the Crown and Maori as reflected in the Treaty of Waitangi should be recognised and provided for in the conservation and sustainable use of biodiversity, including kaitiakitanga, customary use, and matauranga Maori [indigenous knowledge system].* (MFE 2000: 16. Quoted by McClean and Smith 2001: 668)

For the Crown, the issue was framed as a *cultural* issue limited to recognizing *kaitiakitanga* as an important indigenous concept connected to the exercise of certain customary rights. In other words, the Crown accepted to allow guardianship as a cultural manifestation ultimately subjected to its authority. But for Maori, the issue was, and remains, essentially one of partnership: it is a *political* issue, deriving from the proper implementation of the principles enshrined in the Treaty of Waitangi. It is an issue touching on sovereignty and on the precise definition of the rights and duties of each "Treaty partner". Consequently, piecemeal consultation on environmental issues on the part of the Crown has been deemed unsatisfactory and bypasses the essential issue of power-sharing. Even though *kaitiakitanga* is now routinely referred to in political discourse, and has been used as a cultural marker giving New Zealand a distinct character, it has had limited effectiveness in final decision-making. Treaty protection has proven too weak and for Maori, the government has been reluctant to follow its own recommendations over the years.

All of these questions find themselves fully addressed in the final report for the WAI 262 claim. The sheer scope of the original Fauna and Flora claim (the whole of New Zealand's biodiversity plus the indigenous system of knowledge and language), as well as the length of the proceedings – twenty years of inquiries, pre-reports and hearings – make it one of the most important cases ever dealt

with by the Tribunal. Although the recommendations issued by the Tribunal do not have binding effect, their impact is important as moral pressure is exercised on the government to implement them as best they can. This is because the work of the Tribunal continues to be part of the general reconciliation process initiated and pursued by the successive New Zealand governments themselves. The release of the final report in July 2011 was therefore clearly a political event.

WAI 262 and the *Ko Aotearoa Tene*i 2011 report

The final Waitangi Tribunal report deals both with environmental questions and the protection of the indigenous system of knowledge, including the Maori language, in relation with Treaty obligations on the part of the Crown. It is the first "whole-of-government" case, which means that the report reviews *all* of the related Crown's actions and policies. We will focus here specifically on the environmental issues and leave aside the discussion around Maori works of art and other cultural manifestations (such as the *haka*).[7]We should note the contemporary focus of the report: although the Tribunal recognizes "the significant historical content and context" of the claim (Waitangi Tribunal 2011: 7), its choice is to deal with the present situation rather than with a historical grievance deriving from the history of colonization in New Zealand and the associated exclusion of Maori from the management of the environment, starting in the early days of British settlement with the modification of the landscape and the clearing of the land, down to the absence of consultation of Maori in particular by local authorities, over projects or economic activities having an impact on the environment. The foreword expresses a sense of urgency and the will to address very practical current questions pertaining to customary law, property rights and conservation: "It is obvious that law and policy must be developed with the express and urgent objective of capturing – not squandering – Māori potential. Our collective future will depend on that objective being achieved." (Waitangi Tribunal 2011: xxiv). This discourse reflects the major preoccupation of the Tribunal: beyond very technical discussions, the ultimate purpose is to propose a framework within which Maori and *Pakeha*[8] interests will cohabit harmoniously and contribute to national development.

At the origin of the claim there were concerns over contemporary issues, in particular over genetic engineering and the commercial use of indigenous

7. The second volume of the report actually deals with *te reo*, that is the Maori language. It was released as a pre-report in 2010. Chapter 1 of the first volume deals with *taonga* (treasures) associated with Maori culture, such as traditional tattoo designs, the *haka*, sculpture, weaving, etc.

8. *Pakeha* refers to the New Zealand population of British descent.

biodiversity, notably by multinationals. This question had been referred to in the draft statement of issues published by the Waitangi Tribunal in 2005 as "intellectual property in genetic resources of *taonga* species – that is, species that the claimants had listed as being of particular significance to them." (Waitangi Tribunal 2011: 6). The wording was a direct reference to the Maori text of Article Two of the Treaty of Waitangi which guaranteed Maori protection of their *taonga* or treasures. The final report quotes the draft statement and reaffirms "the core Māori value of *kaitiakitanga* as central to the claim". It refers to this early definition of *kaitiaki* as "those whose special relationship with a *taonga* gives rise to an obligation and corresponding right to protect, control, use, preserve, or transmit the *taonga* itself and also the relationship of *kaitiaki* to the *taonga*." (Waitangi Tribunal 2011: 7).

But the framework within which the Tribunal would finally place the claim from 2006 had moved from those rather cultural concerns to more political concerns:

> *Our final statement of issues* […] *included a revised definition of kaitiakitanga that placed kaitiaki obligations in the context of the concept of tino rangatiratanga. Indeed, it identified the two as inseparable – tino rangatiratanga as the right and kaitiakitanga as the corresponding obligation towards taonga. It defined tino rangatiratanga in this context as including the right of kaitiaki to make and enforce laws and customs in relation to their taonga.*
>
> (Waitangi Tribunal 2011: 8. Emphasis mine).

Tino rangatiratanga refers to the highest authority or chieftainship that Maori may exercise from the point of view of customary law over their land and other prized possessions or treasures. For Maori, it is a question of *mana* (the prestige derived from the exercise of authority). Most importantly, it is equated with a form of sovereignty: it is the very expression used in the Maori version of the Treaty of Waitangi, Article Two.[9] The exercise of *tino rangatiratanga* involves a degree of power sharing and is a quasi constitutional obligation if the Treaty is to be upheld as the founding document of the nation. This point has remained a hotly contested issue, particularly the extent of the native authority or *tino rangatiratanga*. However, the Tribunal itself has clearly adopted the position that the Treaty *does have* constitutional status (Waitangi Tribunal 2011: 15) – although we should insist on the fact that this particular status has never been endorsed by Parliament: to

9. The glaring discrepancy between the English version of the Treaty and the Maori version has been the stumbling block for Treaty interpretation from the beginning: "*The Maori text predicates a sharing of power and authority in the governance of the country between Crown and Maori. The English text is about a transfer of power, leaving the Crown as sovereign and Maori as subjects.*" (Williams 1989: 79-80).

this day, it remains a political concession to biculturalism.[10] The Waitangi Tribunal expressly declined to discuss "the current constitutional arrangements or the place of the Treaty of Waitangi" in this report (Waitangi Tribunal 2011: 12). Nevertheless, by establishing a connection between the concept of *tino rangatiratanga* (native authority) and *kaitiakitanga* (guardianship), the Tribunal recognized that on the basis of the Treaty of Waitangi, Maori *were* guardians of the environment in their own right and were *legally* entitled to manage the native biodiversity in cooperation with the Crown. As a consequence, from the very beginning, the report clearly announced that it was going to deal with the forms that the partnership should take and with the necessary remedies in case of non observance of the partnership principle. This is further substantiated by the view that the Crown's right to "enact laws and make policies" was really granted through a Treaty signed between *equals* and that that right was not absolute: it was "qualified by the promises solemnly made to Maori in the Treaty." (Waitangi Tribunal 2011: 15). Among those promises, was the guarantee to uphold native authority or *tino rangatiratanga,* and the protection of Maori treasures or *taonga.*

This does not mean that there are no restrictions placed on the exercise of Maori customary authority or *tino rangatiratanga.* The Tribunal has been careful to recall that this Treaty principle is not absolute either, particularly because of the onslaught of colonization on to Maori land and its negative effect on Maori authority. In other words, in this post-colonial age, the Tribunal suggests it is time to move on and to acknowledge the irreversible changes brought about by colonization. This is a compromise that the Tribunal offers to deliver: "full authority in *some* areas" and a share of decision-making in others. In any case, partnership remains "an over-arching principle" (Waitangi Tribunal 2011: 24).

From this starting point, the Tribunal has been intent on precisely defining *kaitiakitanga* in relation to the Maori indigenous system of knowledge. The report therefore provides an overview of the Maori approach to the world, in order to fully clarify the implications of the claim. It focuses on one central element in the claim: the reference to kinship – *whanaungatanga* - and more precisely to *whakapapa*, usually translated by genealogy. Here, the report notes: "[…] it is an epistemology – a way of ordering knowledge itself. » (Waitangi Tribunal 2011: 37). The purpose is to legitimize the Maori worldview as a perfectly rational and valid alternative to the western views that have become dominant. The part of the claim dealing specifically with bioprospecting and genetic engineering relies

10. New Zealand governments so far have eschewed the issue of the proper constitutionalization of the Treaty of Waitangi which, under the common law, remains subject to the principle of the omnipotence of Parliament. Its force is recognized through certain Acts of Parliament and through a number of Court decisions which have become precedents. On this issue see David Williams (Williams 1990: 16-18).

on the concept of *whakapapa* as the basis for its argument. Maori lawyer for the claimants Maui Solomon summed it up in this way: « The act of deliberately taking genes from one species and implanting into another for perceived 'economic' or other social benefits is regarded by the claimants as tampering with the sacred matrix of life namely *whakapapa*. » (Solomon 2005: 224).

The report gives an overview of this line of reasoning by referring to the Maori myths of creation which place the earth mother at the origin of every line of ancestors. Again, it is the special relationship of Maori to the environment that is used to speak against contemporary procedures deemed objectionable and dangerous. It is the concept of guardianship and the associated sense of spiritual responsibility which justify the Maori claim against commercial genetic engineering.

The claimants consider that Maori guardianship is directly threatened by the latest research developments and new commercial uses derived from bioprospecting. The patenting of life forms, which is typically the ultimate goal of bioprospecting, is also objected to because it by-passes Maori tribes who regularly engage in their daily lives with certain native species that they consider as *taonga s*pecies protected under the Treaty of Waitangi. Maori consent is rarely sought, the input of Maori traditional knowledge usually not recognized, and there is no protection against what Maori custom would consider improper uses. Maori find themselves at a disadvantage in a system dominated by western concepts of exclusive property. Maui Solomon, lawyer for the Maori claimants, clearly identified the problem:

> *IPR [intellectual property rights] is based on private economic rights which give the holders of those rights a monopoly for a limited period of time to exploit those rights. Whereas, indigenous-based rights and knowledge systems are values based and are integral to the maintenance of the cultural identity of the peoples concerned. They are collective and intergenerational in nature.*
>
> (Solomon 2007: 81)

In the same way, the report notes that guardianship or *kaitiakitanga* is "a community-based concept" as opposed to the individualistic approach of western property rights (Waitangi Tribunal 2011: 116). In this context, Maori ask for their special relationship with *taonga* species to be included in intellectual property law.[11] The report precisely records the full range of Maori

11. New Zealand domestic law currently provides no such protection. In reviewing the latest developments in international law, the Waitangi Tribunal expresses surprise at the fact that the Crown has not taken any steps so far to translate those into domestic law, particularly section 7 of the Nagoya Protocol. This international instrument was adopted in 2010 by the Conference of the Parties to the Convention on Biological Diversity (CBD 1992). It recommends fair and equitable benefits sharing arising from the utilization of genetic resources.

demands: from the recognition of indigenous property rights in *taonga* species to a right of veto over bioprospecting and the use of genetic resources, from the protection of the *kaitiaki* relationship to the protection of indigenous knowledge relating to native species. As for the Crown, its position was clearly to deny any property rights deriving from the exercise of guardianship.

In this difficult context, the recommendations of the report are hinged upon the necessity to find a compromise solution for both parties. For the Waitangi Tribunal, it is clearly paramount that the principles of the Treaty of Waitangi should be upheld in the final proposals[12]. Because those principles give protection to Maori as one of the founding peoples of the nation, what is essential is to define the extent of that protection in relation to the claim. However, the need to take into account the Crown's position, economical interests together with the interests of non-Maori New Zealanders qualifies this protection.

In order to achieve this complicated balancing act, the Tribunal operates a rather stunning reversal of argumentation. We have noted that the Maori version of the Treaty is to be used in court decisions or in recommendations by the Waitangi Tribunal, an approach adopted by the Tribunal itself in the early 1980s. This is due to the fact that Maori is the language which at the time would have been most likely to convey the full implications of the Treaty to the native signatories.[13] It is for this reason that the concept of Maori chieftainship or authority (*tino rangatiratanga*) is constantly referred to, as opposed to the term "possessions" in the English version. But in this case, Maori claimants are asking for native *property rights* to be vested in *taonga* species, based on the *English* version of the Treaty. The Tribunal answer is then very clear: on the basis of all the evidence reviewed, the Treaty does not recognize any property rights to Maori in *taonga* species. What is protected instead is the exercise of guardianship as a manifestation of *tino rangatiratanga*, certainly not exclusive property rights based on western concepts of intellectual property: "We conclude that the Treaty does not provide for Māori ownership of taonga species or their genetic and biological material. Rather, it is the kaitiaki relationship with the taonga species that is entitled to a reasonable degree of protection." (Waitangi Tribunal 2011: 189).

In the same way, Maori cannot exercise a right of veto over the exploitation of certain native species, even when that exploitation is derived from the

12. Those principles have been repeatedly spelled out by various reports of the Tribunal; they comprise effective partnership (resulting from the concept of *tino rangatiratanga*: highest authority or chieftainship), active protection (of Maori *taonga* or treasures), duty to consult and the principle of redress, "required where the Crown fails actively to protect Maori interests" (Waitangi Tribunal 2002: 71).

13. This is the common law *contra proferentem* rule of interpretation of a contract, which the Waitangi Tribunal decided to use in relation to the Treaty of Waitangi from 1983.

unauthorized use of native knowledge (for instance relating to the medicinal use of plants). The reason is that a lot of this knowledge has been made public since the beginnings of colonization, through various books and publications:

> *We conclude that the Treaty does not provide for Māori ownership of mātauranga Māori [indigenous knowledge] at least where the knowledge is already publicly known, but that kaitiaki have a right to acknowledgement and to have a reasonable degree of control over the use of mātauranga Māori. Where mātauranga Māori is used commercially, the kaitiaki interest must be given better recognition.* (Waitangi Tribunal 2011: 189).

As a consequence, the Tribunal recommends a case by case approach involving consultation of Maori communities and balancing the interests of research and development and those of local *kaitiaki*. The general idea is to associate Maori in the management of New Zealand's biodiversity. The Tribunal holds that specific consultation mechanisms must be set up, but not simply in passing, as has been done in some areas.[14] On the contrary, those mechanisms must make sure that the Maori voice is heard and that the exercise of guardianship is protected. The Tribunal is also careful to insist on the fact that the current situation must be reformed because of the preeminence of the western approach: "The legal and policy frameworks are established principally to serve the interests of research and commerce […] as viewed through the lens of te ao Pakeha." (Waitangi Tribunal 2011: 192). To summarize, the idea is to draw the full implications of the Maori worldview which forms the basis of the Maori claim:

> *In keeping with the Māori preference for holism, it is the relationship as a whole that is entitled to protection, not any property right in genetic and biological resources such as, for example, the potential of its isolated genes. It is the fact that Māori identity is embedded in the species that creates a just claim, not any Western scientific dissection or conception of property. Accordingly, a reasonable degree of Māori control over the use of the genetic and biological resources of taonga species is justified under the principles of the Treaty.*
>
> (Waitangi Tribunal 2011: 194. Emphasis mine).

This means that the Maori concept of guardianship is recognized but does not translate into western property rights. The Tribunal considered that the research and development sector represented a valid interest in this matter. However, this does not give complete freedom to either the Crown or private interests: the "reasonable level of Maori control" which is to be exercised is

14. For example in the existing consultation mechanisms relating to the authorization of genetically modified organisms.

in keeping with the latest international developments on intellectual property rights affecting indigenous peoples (Waitangi Tribunal 2011: 197).

This mitigated approach also finds its justification in the Tribunal's desire to strengthen national unity and work for what it perceives as the collective good. The Tribunal therefore insists on the "unifying dimension" of guardianship:

> *These special relationships are not just for the benefit of Māori. They relate to this country's unique flora and fauna within equally unique land and seascapes. They must now be seen to deserve protection as an element of national identity. For many New Zealanders, indigenous flora and fauna are not merely a resource to be exploited. Indigenous plants and wildlife are symbols of nationhood, and possess intrinsic value that requires protection*. (Waitangi Tribunal 2011: 197).

This is very much in tune with the discourse of national identity that the Tribunal has been delivering from its inception, a unifying discourse seeking to encompass the Maori element. As well as offering a public forum for the expression of Maori grievance over colonization, the Tribunal has been intent on defining New Zealand's identity on the basis of biculturalism. This report is redundant with references to national identity and the inclusion of Maori: "This emphasis on partnership makes New Zealand unique among the post-colonial nations (such as the United States, Canada, and Australia) with which we are most often compared." (Waitangi Tribunal 2011: 197). Consequently, Maori involvement in decision-making on the basis of their traditional worldview is presented as beneficial for the nation as a whole:

> *The ability of kaitiaki to protect their relationships with taonga species also serves the interest of all New Zealanders in fostering the preservation of New Zealand's biodiversity. Protecting the kaitiaki interest and conserving indigenous flora and fauna are two sides of the same coin.* (Waitangi Tribunal 2011: 197).

The general compromise that the tribunal is trying to work out should therefore be used as a basis to move beyond grievance and establish a positive relationship not only between Maori and the Crown, but also between Maori and non-Maori New Zealanders. Numerous references to Maori symbols reinforce this view. For instance, the chapter of the report dealing with the issue of conservation and the management of national parks delivers recommendations inspired from the Maori tradition. Instead of simply imposing a strict conservationist approach which would tend to exclude Maori traditional practices – such as 'customary harvest' or 'customary use' of *taonga* present in conservation areas – and limit access to those *taonga*, it insists on combining conservation with the Maori concept of guardianship:

> *The 'kaitiaki conservation' approach we recommend requires the weaving together of two approaches to conservation – the preservationist approach and that of kaitiakitanga. This synthesis is reflected in the flight of the tūī, which is often likened to a stitching or weaving action.*
>
> *(Waitangi Tribunal 2011: 369).*

The principle that the Tribunal is systematically putting forward is that of a close association between government bodies, local authorities and Maori tribes (*iwi*). Only such an association will reflect the spirit of the Treaty of Waitangi and enhance New Zealand's national identity. For the Tribunal, it is high time to move beyond the settlement of historical grievances and to adopt mechanisms that will ensure effective Maori partnership in the management of the environment and give the tribes "control." To quote the report, it is time to give guardianship "effective influence and appropriate priority." (Waitangi Tribunal 2011: 285-286).

Conclusion

Beyond the legal issues, the significance of the claim and its resonance for New Zealand as a nation is highlighted by the new title chosen by the Waitangi Tribunal for the final report *Ko Aotearoa Tenei*: "This is Aotearoa" or "This is New Zealand". Clearly, the ambition of the Tribunal here was not only to deal with technical issues pertaining to intellectual property and customary law or indigenous knowledge. The Tribunal has placed the whole claim within the framework of defining a national identity for New Zealand. What is the place of Maori culture in New Zealand? Which framework would both respect the provisions of the Treaty of Waitangi and the necessity of economic development for the country? How can Maori be included in this development?

Although their fundamental values were upheld, in particular the concept of guardianship and their special relationship to the environment, Maori were not given extra protection in the field of property rights applying to the native biodiversity. Although the inclusion of Maori in the New Zealand economy also appeared as a major concern for the Tribunal, the means to achieve this inclusion are not clearly defined. The tribunal calls for a true partnership to be put in place, but its recommendations are not binding. However, the *Ko Aotearoa Tenei* report appears as a vibrant plea for a revitalized biculturalism which would enable the nation to move beyond grievance and conflict in order to "unlock Maori potential for the benefit of the country as a whole." (Waitangi Tribunal 2011: xxv). For the Tribunal, Maori must become more than a peripheral concern for government.

For Maori, the conclusions of the Waitangi Tribunal could come as a disappointment. In an increasingly multicultural nation, the Maori minority finds itself marginalized and its culture under siege. Competing in the global economy while preserving a holistic approach to the world may appear as an impossible challenge for Maori communities. In this context, the merit of the Waitangi Tribunal report is both to present very accurate picture of the situation and to raise the alarm: the experts have delivered their report, now it is time for politicians to implement the necessary changes if New Zealand is to remain true to its founding principles.

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Williams, David V, "The Constitutional Status of the Treaty of Waitangi: An Historical Perspective". *New Zealand Universities Law Review* vol. 14. (June 1990): 16-18.

Abstract: The definition of Maori as *tangata whenua* - literally the people of the land – has been the basis of contemporary Maori activism building on an indigenous version of political ecology. As a consequence, the Maori concept of *kaitiaki* or guardian of the environment has now become a feature of New Zealand mainstream culture. It has been used to legitimate the claims being brought forward within a western legal framework in the Waitangi Tribunal – an official New Zealand body in charge of examining alleged violations of Maori rights and privileges originally granted in 1840 by the Treaty of Waitangi signed with the British Crown. This communication focuses on the Flora and Fauna Treaty of Waitangi Claim (WAI 262) which deals with indigenous biodiversity and the indigenous system of knowledge relying on this biodiversity. It provides an illustration of conflicting issues over global capitalism and western concepts of intellectual property, versus an indigenous holistic worldview.

Keywords: New Zealand, indigenous people, Maori, reconciliation, customary law, Treaty of Waitangi, biodiversity

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Résumé : Depuis la fin des années 70, la définition des Maoris comme *tangata whenua*, littéralement « le peuple de la terre », fonde un militantisme contemporain se nourrissant d'une version autochtone de l'écologie politique. En conséquence, depuis les vingt dernières années le concept maori de *kaitiaki* ou gardien de l'environnement fait partie de la culture néo-zélandaise grand public. Mais l'écologie politique continue de structurer le discours politique maori de manière plus fondamentale et a été utilisée pour légitimer les plaintes déposées devant le Tribunal de Waitangi, structure juridique occidentale et autorité néo-zélandaise officielle chargée d'instruire les allégations de plaintes pour violation des droits et privilèges accordés à l'origine aux Maoris par le Traité de Waitangi, signé en 1840 avec la Couronne britannique. Cette communication a pour objet la plainte déposée depuis 1991 concernant la faune et la flore (WAI 262) et qui s'applique à l'ensemble de la biodiversité indigène ainsi qu'au système de connaissance lié à cette biodiversité. Elle illustre les conflits contemporains entre capitalisme global, concept occidental de propriété intellectuelle et vision autochtone holiste du monde.

Mots-clés : Nouvelle-Zélande, peuple autochtone, Maori, réconciliation, Traité de Waitangi, droit coutumier, biodiversité

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